The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, v. SAM REED, in his official capacity as Secretary of State of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of State of Washington, Defendants.	NO. 3:09-CV-05456-BHS DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION TO AMEND COMPLAINT

Defendants Sam Reed and Brenda Galarza oppose the Plaintiffs' motion to amend their complaint. Plaintiffs seek leave of this Court to amend their original complaint and overlay a new and separate lawsuit joining totally new defendants and adding totally new claims that relate solely to those new defendants onto this case. They do this without establishing any relationship between their original complaint, the original defendants, the original relief they sought, and the proposed new claims and defendants. Their request should be rejected.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

I. STATEMENT OF FACTS

Plaintiffs' original complaint challenges the application of the Washington State Public Records Act ("PRA") to referendum signature petitions, including the Referendum 71 petition. Dkt. No. 2. The named defendants in that proceeding are the elected official who held the records, Secretary of State Sam Reed, and his public records officer, Brenda Galarza.

Plaintiffs now propose to add three new counts to their complaint, none of which are related to the PRA or to the powers and duties of the Secretary of State or his public records officers. The new claims all concern a completely separate body of state law related to the disclosure of campaign finances - Wash. Rev. Code Ch. 42.17 (RCW). Dkt. No. 85-2 at 15-18. Recognizing that these new issues cannot be adjudicated among the existing parties, Plaintiffs also seek to join in this case the state Attorney General, the individual members of the state Public Disclosure Commission (PDC), and the Snohomish County Auditor, Carolyn Weikel. [1]

The PDC is responsible for implementing and enforcing laws and rules related to state campaign financing, lobbyist reporting, reporting of public officials' personal financial affairs, and reporting by public treasurers. Declaration of Vicki Rippie at ¶3; *see also* RCW 42.17.360, .370. Under RCW 42.17.370(10), the PDC is also authorized to hear requests from filers for modifications or suspensions of the reporting requirements in RCW 42.17. These are typically referred to as "modification requests." Rippie Decl. at ¶7.

Plaintiff PMW is registered and reports as a political committee in Washington State. Rippie Decl. at ¶9. In August 2009, PMW made a request to the PDC for a modification of

[1] Proposed defendant Attorney General Robert McKenna appears to be included in the proposed amended complaint because of his authority to bring actions in state courts for violations of state campaign finance laws. For purposes of this response, all arguments related to the PDC commissioners also apply to him. Additionally, as to proposed defendant Snohomish County Auditor Carolyn Weikel, other than an assertion that her office handles a ministerial function of receiving reports, Plaintiffs have failed to tie her to any of the constitutional challenges. The basis for joining a county officer appears slight.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

its reporting responsibilities under RCW 42.17. Rippie Decl. at ¶10. Specifically, PMW requested to withhold identifying information concerning its contributors, including names, addresses and where applicable, occupation and employer information. Rippie Decl. at ¶10. The full Commission held a public hearing on the PMW request on August 27, 2009. Rippie Decl. at ¶13. After considering testimony from witnesses and written submissions, the PDC denied PMW's request because it determined that PMW had not met its statutory burden of proving, by clear and convincing evidence, that a literal application of the law would work a "manifestly unreasonable hardship" on PMW and that a modification would not "frustrate the purposes of the act." Rippie Decl. at ¶13. The order in this matter was signed on September 8, 2009 and mailed on September 11, 2009. Rippie Decl. at ¶13. Under the state Administrative Procedure Act, the PMW has 30 days to appeal this decision so this state matter has not concluded. RCW 34.05.542; *see also* Rippie Decl. at ¶14.

In addition, until Plaintiffs' counsel requested consent to add the proposed Defendants, the PDC was never involved in the underlying claims of the original complaint. Declaration of Nancy Krier at ¶3-4. Plaintiffs' counsel had only discussed some campaign finance disclosure requirements with PDC staff. Declaration of Lori Anderson at ¶4. Counsel asked whether political committees were subject to RCW 42.17.105(8). He did not ask any other specific question nor did he qualify his question. To the best of their knowledge, PDC staff and commissioners have had no notice of this pending motion from the Plaintiffs or Plaintiffs' counsel. Krier Decl. at ¶5. Nor do the PDC or its staff have any records that would be responsive to the claims raised in the original complaint. Krier Decl. at ¶8.

II. LEGAL ARGUMENT

A. The Federal Rules of Civil Procedure 15 and 20 Provide the Framework for Consideration of Plaintiffs' Request.

In determining whether a party should be allowed to amend pleadings to include new

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

parties or claims, the court first considers the provisions of Rules 15 and 20 of the Federal Rules of Civil Procedure.[2] *Desert Empire Bank, et al. v. Insurance Co. of North America, et al.*, 623 F.2d 1371, 1374 (9th Cir. 1980). Plaintiffs correctly note that, because an answer has been filed in this matter by the Defendants, leave of the court is required absent the Defendants' consent. Fed. Rule of Civ. Pro. 15(a)(2) ("In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave.") Defendants have not consented to this amendment and by this response actively resist the amendment as proposed. Dkt. No. 85 at 3. Even though the rule allows the court to "freely give" leave to amend, it contemplates that denial of permission is appropriate in some circumstances. Denial is appropriate where, as here, the plaintiff is attempting to bring a new lawsuit. *Curry v. Weiford,* 389 F. Supp. 2d 704 (N.D. W. Va. 2005).

As to the question of whether to allow the Plaintiffs to add new claims[3], the courts consider five factors to "assess the propriety of a motion for leave to amend": (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint. *See Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir.1990); *see also Jordan v. Los Angeles County,* 669 F.2d 1311 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982). These factors "need not all be considered in each case." *Davis v. Astrue,* 250 F.R.D. 476 (N.D. Cal. 2008); *see also Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052 (9th Cir. 2003) ("Not all of the factors merit equal weight"). This Circuit has determined that prejudice to the opposing party is given the greatest weight. *Eminence Capital, LLC,* 316 F.3d at 1052.

---

[2] Contrary to Plaintiffs' assertion, Rule 19 does not apply in this instance. Rule 19, the mandatory joinder rule, applies where necessary or indispensible parties have not been included. This rule may apply if the proposed claims were already a part of the proceedings. But where they do not currently exist, Rule 20, the permissive joinder rule, is the proper rule for the Court to consider.

[3] To the extent that Plaintiffs seek to add new claims under Rule 18, this rule only applies to new claims against an existing party. The rule on joinder of claims merely permits the joinder of other claims against the same party. *Dore v. Kleppe*, 522 F.2d 1369 (5th Cir. 1975). The rule does not address the joinder of parties and operates independently of Rule 20. 6A Fed. Proc. Prac. §1585 n.3. Only when parties have been properly joined, would Rule 18 apply to the joinder of new claims.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

As to the addition of new parties, Rule 20, which relates to permissive joinder, must also be considered. *Desert Empire Bank,* at 1374. With respect to the application of Rule 20(a), the *Desert Empire Bank* court sets two requirements that must be met for permissive joinder of parties, namely,

> (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence or series of transactions or occurrences; and
>
> (2) some question of law or fact common to all parties must arise in the action.

Id. at 1375. In addition, the court is required to consider the "principles of fundamental fairness" in determining whether to allow permissive joinder, including such factors as possible prejudice to the parties to the litigation, delay on the part of the moving party in seeking an amendment, the motive of the moving party, the closeness of the relationship of the new and old parties, the effect of an amendment on the court's jurisdiction, and the new party's notice of the pending action. *Id.* at 1375.

B. The Proposed New Defendants Have No Relation To The Existing Claims And The Current Defendants Have No Relation To The Proposed New Claims. For This Reason, Plaintiffs Fail To Satisfy the Provisions of Rule 20.

Plaintiffs have failed to satisfy the provisions of Rule 20 and fundamental fairness to the current defendants requires denial of the request. As defined in *Desert Empire Bank,* to amend a complaint to add new parties, the Plaintiffs must demonstrate that the "right to relief . . . asserted by, or against, each . . . defendant relat[es] to or aris[es] out of the same transaction or occurrence or series of transactions or occurrences." 623 F.2d at 1375. The rule thus requires a significant connection between the proposed defendants and the claims in the existing lawsuit. The proposed new defendants did not participate in any of the actions that support the original claims, the proposed new claims do not arise out of the same transaction or occurrence as the original claims, and the existing defendants have no relationship to the new claims. Quite simply, the laws and allegations are separate and

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

distinct and the responsibilities of the current and proposed defendants are completely dissimilar. In these circumstances, the proposed amendments do not satisfy Rule 20.

In addition, the proposed defendants have no relationship to the original issues raised by the complaint. They do not have any records that would be responsive to the PRA request submitted to the Secretary of State's Office; they do not enforce the PRA on behalf of the State; they have not received any request for the referendum petitions at issue in this lawsuit; and they exert no authority over any portion of the litigation. Krier Decl. at ¶8; *see* RCW 42.17.350. Under the factors set out in *Desert Empire Bank,* substantial prejudice would exist by requiring either set of defendants to participate in a lawsuit involving claims with respect to which they have no information, control or responsibility.

While Plaintiffs claim that judicial economy dictates inclusion of new defendants and new claims against those defendants, they have failed to substantiate this assertion, relying solely on the argument that there would be some evidentiary overlap between Count II of the existing complaint and Count V of the proposed amended complaint. Dkt. No. 85 at 4. Apart from saying nothing for a relationship between proposed Counts III and IV and the existing complaint, Plaintiffs are incorrect as to Count V. As explained below, proposed Count V is subject to this court's abstention under *Younger v. Harris,* 401 U.S. 37, 50-54 (1971). Once that claim is disposed of, there is no basis for asserting any evidentiary overlap between the proposed amended complaint and the existing complaint. Additionally, there is no relationship between the existing defendants and the proposed defendants who are responsible for implementing and enforcing very separate laws upon which Plaintiffs' proposed new claims depend. Finally, considering the final *Desert Empire Bank* factor – notice to the new proposed parties, Plaintiffs provide no evidence that they provided notice of the pending action or this motion to the PDC Commissioners or Ms. Weikel. Dkt. No. 85

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

at 3[4]; Krier Decl. at ¶5. As such, Plaintiffs' request to include the proposed new defendants should be denied.

C. Plaintiffs' Proposed Claims Have No Relation To The Current Defendants So They Should Not Be Included In This Lawsuit.

In addition to adding new defendants, Plaintiffs propose to add three new claims to this complaint, to challenge the constitutionality of provisions of Washington State's campaign finance disclosure laws. None of the proposed new claims relate in any way to the current defendants, or to the law at issue in the current lawsuit. Their addition would prejudice the current and proposed defendants by requiring them to respond to claims that have no relation to them. Moreover, Plaintiff PMW is pursuing at least one of the proposed claims in a state proceeding although it has not disclosed this fact to the court.[5] The Court may and should reject Plaintiffs' motion to include new claims for these reasons. *Allen*, 911 F.2d at 373; *see also Hughes v. U.S.*, 953 F.2d 531, 541 (9th Cir. 1992) (Where court has no jurisdiction over claim, it does not commit error when declining to permit joinder).

1. Count V of the Proposed Amended Complaint

Without referring to a particular statute or rule, Plaintiffs allege in proposed Count V, that PMW may not be required to report identifying information about its contributors. Dkt. No. 85-2 at 18. Because state proceedings are on-going related to this reporting obligation and the PDC has entered an appealable Order in those proceedings, it would be futile as well as improper to raise the claim in this case.

Long standing federal court jurisprudence provides that the federal courts will abstain from engaging in litigation where the same litigation is pending in a state court. *Younger v.*

---

[4] The Certificate of Service filed by Plaintiffs for this motion shows no service on any of the proposed new defendants. Dkt. No. 85 at 10.

[5] Defendants also note that earlier in this proceeding, Plaintiffs vigorously resisted adding new parties to this action, upon defendants' motion. Dkt. No. 28. Plaintiffs' attempt to now add new parties it chooses, and to add entirely new claims, should be recognized as untimely, unsupported, and will create significant expense for the defendants. The dates for committees to file campaign finance reports have been made available since September 2008 and posted online since January 2009 (Anderson Decl. at ¶3) and PMW has been filing campaign finance reports since May 2009 (Rippie Decl. at ¶9).

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

Harris, supra. Federal courts decline jurisdiction and dismiss actions when the abstention doctrine in *Younger v. Harris* is satisfied. *Younger,* 401 U.S. at 50-54; *also see* 5B Fed. Prac. & Proc. Civ. 3d 1350 at 96-100, C.A. Wright & A.R. Miller (motion for abstention is treated under the analytical framework of Rule 12(b)(1)). The *Younger* doctrine compels a federal court to abstain from considering a federal claim for relief from a state law when the state has initiated action seeking to enforce the law in controversy and the matter is pending in state court or before a state agency. *See Younger,* 401 U.S. at 50-54; *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose,* 546 F.3d 1087, 1091-92 (9th Cir. 2008); *Gilbertson v. Albright,* 381 F.3d 965, 970-75 (9th Cir. 2004). The *Younger* abstention doctrine fully applies to any federal case that would interfere with a state civil proceeding, when an important state interest is involved. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432 (1982); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986); *City of San Jose,* 546 F.3d at 1092.

The *Younger* doctrine holds that a federal court must abstain from hearing a federal case that could interfere with a state procedures or proceeding if four requirements are met:

(1) a state-initiated proceeding is ongoing;

(2) the proceeding implicates important state interests;

(3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and,

(4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that *Younger* disapproves.

City of San Jose, 546 F.3d at 1092; *Gilbertson*, 381 F.3d at 978.

Here, at PMW's request, the PDC initiated state administrative proceedings involving the modification of its reporting requirements under the state campaign finance disclosure laws and rules, the same ones that are believed to be at issue here. Rippie Decl. at ¶10-14. PMW

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

sought a reporting modification as allowed under RCW 42.17.370(10) to withhold the information concerning its contributors. *Id.* at ¶10. A public hearing was held on August 27, 2009 on PMW's request and a Commission decision announced on that date. *Id.* at ¶13. The written Final Order was dated September 8, 2009 and mailed to the PMW on September 11, 2009. *Id.* State law sets forth the process for appealing that decision, and the process allows PMW to contest the final order and raise each of the issues it now seeks to make part of this proceeding through proposed Count V. RCW 34.05.542; RCW 34.05.518 (authorizes review of administrative order directly to the state appellate courts); RCW 34.05.550 (provides for stay and other temporary relief from administrative order); RCW 34.05.570(3)(a) (allows for review of administrative order based on constitutional violations).

It hardly may be doubted that the disclosure of campaign financing implicates important state interests. Moreover, it is apparent that PMW seeks to interfere with and enjoin the pending administrative proceedings. Under Washington law, PMW is free to pursue its remedies through an appeal process in state court that allows for consideration of the constitutional claims cited in the proposed amendments. This is precisely the situation that the *Younger* doctrine is designed to address. The court should reject Plaintiffs' request to amend and include this claim for this additional reason.

2. Count III/Count IV of Proposed Amended Complaint

The remaining new claims proposed by Plaintiffs involve constitutional challenges to two state campaign finance disclosure statutes which have no relation to PRA or the current defendants. Dkt. No. 85-2 at 16-17. Plaintiffs fail to discuss in any meaningful way how these counts relate to the existing suit and the current defendants or how relief would be granted against them. In fact, given that the current defendants have no responsibility or authority for adopting rules to implement or seeking enforcement of these statutes, they would have nothing to contribute to adjudication of the new claims. Likewise, the proposed new defendants would have nothing to contribute to adjudication of the original claims raised

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

in Counts I and II of the complaint. Adding unrelated new claims would waste the time and resources of the defendants, without saving significant resources for the court or even the Plaintiffs.

Plaintiffs assert that there is "substantial similarity" between their claims regarding the PRA and campaign finance statutes and that the evidence to response will be similar. Plaintiffs are wrong. The application of these statutes are different; the enforcement of these statutes are different; the standards under which these statutes are reviewed are likely different; and the manner in which these statutes are defended is likely to be different.

Currently, there are two proposed intervenors in the case as it applies to the PRA. There could be a completely different set of individuals or groups who may wish to get involved with the challenges to the campaign finance laws. The current defendants should not be required to bear the cost and burden of participating in a lawsuit over which it has no information and for which there is no real relief that could be granted against them.

III. CONCLUSION

The rules of civil procedure do not contemplate that a plaintiff can take an existing lawsuit and through a motion for leave to amend, attach a completely different case to it. The Court should exercise its discretion to deny this motion because a plaintiff should not be allowed to add totally new claims made solely against totally new defendants to an existing lawsuit.

DATED this 2nd day of October, 2009.

ROBERT M. MCKENNA

/s/ James K. Pharris
James Pharris, WSBA 5313
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
(360) 664-3027